ADVOCATES
FOR HIGHWAY
AND AUTO SAFETY

ORIGINAL

July 7, 1999

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Docket Clerk,
U.S. Department of Transportation Dockets
Room PL-40 1
U.S. Department of Transportation
400 Seventh Street, S.W.
Washington, D.C. 20590

Qualification of Drivers; Exemption Applications; Vision
Notice of Petitions and Intent to Grant Applications for Exemption
***64* Fed. Reg. 27027, May 18, 1999**
Supplemental Comments

Advocates for Highway and Auto Safety (Advocates) filed comments on the above-captioned docket with the Federal Highway Administration (FHWA) on June 16, 1999. Those comments raised an issue regarding the agency's reliance on conclusions drawn from the defunct Vision Waiver Program. In our comments, Advocates requested the agency to "re-evaluate the merits of the petitions, and reconsider its preliminary determination to grant the exemption petitions, without any reliance on, or references to, the experience of the drivers who participated in the vision waiver program." Comments of Advocates to DOT Docket No. FHWA-99-5578, p. 2, June 16, 1999.

Since Advocates filed its comments, the U.S. Supreme Court rendered its decision in *Albertsons, Inc. v. Kirkingburg,* No. 98-591 (June 23, 1999), a case which is directly relevant to the issue raised in our prior comments to this docket, and which is highly instructive with regard to the issuance of waivers and exemptions by FHWA.[1]

In *Albertsons,* the Supreme Court specifically rejected vision waivers as a regulatory modification of the vision standard in the Federal Motor Carrier Safety Regulations (FMCSRs). "[W]e think it was error to read the regulations establishing the waiver program as modifying the content of the basic visual acuity standard. . . ." *Albertsons, slip op.* at 15. The Court refuted the view that "the regulatory provisions for the waiver program had to be treated as being on par with the basic visual acuity regulation, as if the general rule [vision standard] had been modified by some different safety standard made applicable by grant of a waiver." *Id.* The Court reached this opinion based on the FHWA's own assertion that it had no facts on which to base a revised visual acuity standard either before *or after* the vision waiver program. "The FHWA in fact

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'Advocates realizes that waivers and exemptions issued by the Federal Highway Administration are based on analyses and recommendations developed by the Office of Motor Carriers and Highway Safety.

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made it clear that it had no evidentiary basis for concluding that the pre-existing standards could be lowered consistently with public safety." *Id.* at 19. According to the Court, "there was not only no change in the unconditional acuity standards, but no indication even that the FHWA then had a basis in fact to believe anything more lenient would be consistent with public safety as a general matter." *Id.*

In making these statements and reaching its conclusion, the Supreme Court relied heavily on the administrative record compiled and the decision of the Court of Appeals rendered in *Advocates for Highway Safety v. FHWA,* 28 F.3d 1288 (CADC 1994). The Supreme Court summed up the agency's basis for the Vision Waiver Program as follows:

> the regulatory record made it plain that the waiver regulation did not rest on any final, factual conclusion that the waiver scheme would be conducive to public safety in the manner of the general acuity standards and did not purport to modify the substantive content of the general acuity regulation in any way. The waiver program *was simply an experiment with safety,* however well intended, resting on a hypothesis whose confirmation or refutation in practice would provide a factual basis for reconsidering the existing standards.

Albertsons, slip op. at 20 (emphasis added) (citation omitted).

Indeed, although the *Advocates* case was not before it, the Supreme Court went out of its way to endorse the decision reached by the Court of Appeals, noting that is was "hardly surprising that . . . the waiver regulations were struck down for failure of the FHWA to support its formulaic finding of consistency with public safety. See *Advocates for Highway Safety v. FHWA,* 28 F.3d 1288, 1289 (CADC 1994)." *Id.*, at note 21. The Court went on to emphasize that the agency has tried to have things both ways.

> It has said publicly, based on reviews of the data collected from the waiver program itself, that the drivers who obtained such waivers have performed better as a class than those who satisfied the regulation. [Citations omitted]. It has also noted that its medical panel has recommended 'leaving the visual acuity standard unchanged,' see 64 Fed. Reg. 165 18 (1999) [citations omitted], a recommendation which the FHWA has concluded supports its 'view that the present standard is reasonable and necessary as a general standard to ensure highway safety.' 64 Fed. Reg. 165 18 (1999).

Id.

The Supreme Court concluded that employers do not have the burden of defending their reliance on existing safety standards in the FMCSRs in the face of FHWA waivers. According to the Court, were it otherwise,

> [t]he employer would be required in effect to justify *de novo* an existing and otherwise applicable safety regulation issued by the Government itself. The employer would be required on a case-by-case basis to reinvent the Government's own wheel when the Government merely had begun an experiment to provide data to consider changing the underlying specifications.

Id. at 22.

It is clear from the Supreme Court's opinion that whatever validity the Vision Waiver Program may have had (and Advocates does not concede that it ever had any scientific validity), was based on the premise of collecting empirical data in order to revise the visual acuity standard. This was the announced purpose of the program and the basis for data collection methodology. The Vision Waiver Program was not conceived or designed to serve any other legitimate scientific purpose. Since the program was subsequently discontinued by court order, and since the agency has acknowledged that the data collected is not sufficient to revise the existing standard, there is no appropriate use to which the data can properly be applied. Advocates does not accept, and FHWA has not proven, that data collected about drivers who voluntarily participated in the Vision Waiver Program can be used as the basis for granting exemptions (waivers) to drivers who did not participate in that program. There is no credible basis for making such an extrapolation, particularly when the FHWA claims it is making individual assessments of each applicant. The Supreme Court's discussion in *Albertsons* supports Advocates' view that the agency cannot fairly and credibly rely on data collected in the discredited Vision Waiver Program. The Supreme Court was eloquent in its conclusion that the vision waivers were not a credible substitute for the underlying standard. Since the data collected in the program cannot be used for its intended purpose to rewrite the vision standard, it cannot be used for any other legal, regulatory, or policy purpose including to justify the issuance of additional exemptions from the vision standard.

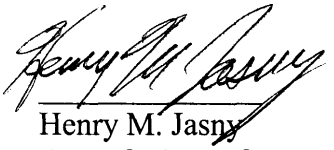
In our previous comments to this docket, Advocates did not raise the issue of FHWA's persistent invocation of the Americans with Disabilities Act (ADA) as the rationale for the Vision Waiver Program and the subsequent issuance of vision waivers, now referred to as exemptions. During the Vision Waiver Program litigation and even after the Court of Appeals nullified that program, the agency steadfastly maintained that the issuance of vision waivers was required in order to comply with the ADA. Advocates has long contended that the ADA does not override existing safety standards contained in the FMCSRs, and that the issuance of waivers is not a viable means of addressing requirements in the vision standard and other medical and physical qualifications for commercial drivers that are purported to be overly stringent. The appropriate procedure is to revise the standards based on relevant and sufficient medical and safety information. In *Albertsons*, the Supreme Court unanimously agreed with this position which has long been held by Advocates.

In reaching its decision, the Supreme Court discussed the legislative history of the ADA. As Advocates previously contended, the Court concluded that "[w]hen Congress, enacted the ADA, it recognized that federal safety rules would limit application of the ADA as a matter of law." *Albertsons, slip op.* at 18. The Court cited the understanding of Congress that " 'a person with a disability applying for or currently holding a job subject to [DOT standards for drivers] must be able to satisfy these physical qualification standards in order to be considered a qualified individual with a disability under Title I of the legislation.' S. Rep. No. 10 l-l 16, pp. 27-28 (1998) [sic]." *Id.* The relevant Congressional committees did request that the Secretary of Transportation conduct a thorough review of knowledge about disabilities and make required changes within 2 years of enactment of the ADA. While FHWA and OMC failed to conduct such a review of the FMCSRs and medical qualifications in general, a review of the vision standard found no empirical evidence on which to base any change in that standard. Thus, the waiver program did not fulfill the Congressional request to make necessary changes to the standards following a review because "the regulations establishing the vision waiver program did not modify the general visual acuity standards." *Albertsons, slip op.* at 18. It cannot be contended that Congress, in enacting the ADA, sought to undermine existing safety standards on an *ad hoc* basis by permitting the employment of persons who do not meet the extant safety requirements mandated by the FHWA.[2] As a result, the Supreme Court concluded that it

> is simply not credible that Congress enacted the ADA (before there was any waiver program) with the understanding that employers choosing to respect the Government's sole substantive visual acuity regulation in the face of an experimental waiver might be burdened with an obligation to defend the regulation's application according to its own terms.

Id. at 22.

In light of the decision in *Albertsons,* FHWA and OMC should re-evaluate the significance of the lower court decision in *Rauenhorst v. U.S. DOT, FHWA, 95* F. 3d 715 (1996), and reconsider the agency's policy of issuing experimental vision exemptions based on non-visual criteria.



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[2] Vision waivers or exemptions are not appropriate methods of providing a reasonable accommodation for persons who do not meet the requirements of the underlying safety standard.